IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 614

MEURER STEEL BARREL COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION AND SUPPORTING BRIEF

EMANUEL A. STERN,
Counsel for Petitioner,
New York 5, N. Y.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-3242

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner above named, respectfully shows:

This is a petition for a Writ of Certiorari to review a judgment made July 21, 1944 by the United States Circuit Court of Appeals for the Third Circuit, affirming a decision of The Tax Court of the United States, entered May 12, 1943.

I. Summary Statement of the Matter Involved.

Deficiencies in income and excess profit taxes for the year 1937 are involved. The commissioner determined a deficiency in income tax of $80,217.45 and in excess profits tax of $21,192.86 against the petitioner (R. 238a). These were, upon petition to The Tax Court of the United States, redetermined respectively at $19,415.86 and $6,157.33 (R. 263a) with memorandum findings of fact and opinion made by a division of that court (R. 238-262a). The decision of The Tax Court was affirmed with opinion (R. 265-271) by the United States Circuit Court of Appeals for the Third Circuit.

Petitioner was a corporation whose assets consisted of a barrel business, securities and a claim in suit. Its stockholders in January, 1937 granted a unilateral option to Jones, one of their number, to purchase their shares for a given price within a stated time (R. 239a). In the event of the optionee's exercise of the option, the optioners had the exclusive right to substitute for petitioner's shares, the shares of another corporation they were free to organize to acquire the business assets of the petitioner (R. 150a, ¶2d). The option proper was extended several times and before its expiration, Jones' attorney met with the stockholders' attorney Stern, in New York, to commence negotiating the terms of a contract of sale of business assets, instead of shares of stock (R. 242a, 127a, 128a, 142a). On the same day, July 9, 1937, the petitioner's shareholders met in the Long Island home of its president, Margaret C. Meurer (R. 266; 241a) and received and approved the report of its president that she believed it to be desirable to retire from the barrel business and that the company's attorney was about ready to submit a plan;

he was authorized to submit the plan to an adjourned session fixed for July 15, 1937 (R. 241a; 165a). On the latter day, a formal plan for the complete liquidation and dissolution of the petitioner was submitted and approved (R. 167a) and implementing resolutions were adopted (R. 168a-174a) for conveyance and transfer of the barrel business, good will and name to stockholders at noon of July 17th, as the first of a series of liquidating distributions contemplated by the plan (R. 242a-244a).

Five of petitioner's stockholders formed a partnership firm to engage in the barrel business and acquired from the remaining shareholders (in some instances by gift, in others by purchase) all the remaining outstanding shares of stock of petitioner or rights of such remaining stock in the declared first liquidating dividend (R. 244a-245a; 176a, 182a-186a). The petitioner on July 17, 1937, transferred and conveyed its barrel business to the partnership (R. 192a, 195a, 245a) and the transferee thereupon, as required in the corporate resolutions respecting the same (R. 242a), assumed (R. 197a) stated obligations with relation thereto, so as to leave the net value of the first distribution at the determined amount, $500,000 (R. 245a). The petitioner ceased business July 17, 1937 (R. 174a; 105a). The partnership entered into the barrel business July 17, 1937 and conducted and operated the same for its own account until July 30, 1937 (R. 246a).

Meanwhile the negotiations initiated on July 9, 1937 had continued to July 22, 1937 and culminated in a formal contract for the sale of the barrel business by the partnership to Rheem Manufacturing Company of California, assignee from Jones of the January stock option (R. 64a, 145a). The contract was delivered, exchanged and became binding on the parties thereto July 22, 1937 (R.

129a, 130a), after being signed by all five members of the partnership on that day (R. 246a), although the last sheet of the uncompleted, and as yet unfinished, proposed contract had previously, on July 17th, been signed by the prospective purchaser's executive while he was on a trip east and left in escrow with his attorneys pending conclusion of the negotiations (R. 64a-65a). Title under the contract passed from the partnership to Rheem in August, 1937 with closing adjustments computed, as thereby required, to July 30th. The deposit monies were paid by check of the purchaser dated and certified July 20, 1937, delivered to the partnership at contract closing July 22d (R. 215a) and the balance of the purchase monies were on August 6th also paid to the partnership (R. 220a-236a; 247a). The capital contribution of the partners to their firm was their individual interest in the first liquidating dividend. The profits from the business operations subsequent to July 17, 1937, besides the net capital was distributed by the partnership to its members in accordance with their stake in the partnership enterprise (R. 73a-74a; 188a; 63a). The January option was not exercised prior to the execution or delivery of the July 22d contract of sale (R. 128a) either directly or indirectly. Other distributions by the petitioner as required by the July 15th plan were made to its stockholders (R. 101a, 80a, 247a).

The partnership reported the sale to Rheem in its 1937 income tax return. The petitioner reported the distribution of its business and other distributions made during 1937 under the plan in its separate tax return for 1937.

Gain from the sale of the business assets to Rheem was attributed by the Commissioner to the petitioner and thereon was based his determination of deficiency (R. 251a-252a). On review, The Tax Court sustained the Commis-

sioner's determination with respect to the sale, but found a number of other errors and redetermined the deficiency in a reduced amount (R. 263a, 256a-261a) and its decision was affirmed on appeal to the Circuit Court.

II. Statement of the Basis of the Jurisdiction of this court.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C. §347(a). The petitioner has complied with Section 8 of the Act of February 13, 1925; 28 U.S.C. §350. The judgment of the circuit court below (R. 271) was entered on July 21, 1944; its decision was filed on that day. This petition is filed within three months thereafter.

III. Questions Presented.

The principal question presented is:

Whether the sale of business assets to Rheem Manufacturing Company of California may be attributed for tax purposes to the petitioner corporation and the gain therefrom taxed to it, as determined below, or whether it must be treated as made and reported namely as a partnership transaction taxable to the partners?

Subsidiary questions are:

Whether there is any evidence tending to sustain the court's conclusion that petitioner's conveyance and transfer of business assets to the partnership was intended by the petitioner as a means of transferring those assets to the ultimate purchaser?

Whether any evidentiary fact or finding supports the conclusion of the courts below, that petitioner's transfer of business assets may not be regarded as a distribution in liquidation?

Whether there is any evidentiary fact or finding that tends to support the courts' conclusion that the ownership of business assets by the partnership must be disregarded?

IV. Reasons Relied on for Allowance of Writ.

1. The judgment sought to be reviewed is erroneously based on inferences for which there is no substantial support in the record or findings. Lacking such support, it was improper and reversible error for the courts below to attribute the sale to the petitioner. The *negotiations* which started July 9th *to change* the January *option on shares* into a *firm contract on assets were* still *uncompleted* at the time of the first liquidating dividend distribution on July 17, 1937, when the petitioner distributed its business assets to the partnership. The partnership was therefore under no legal obligation to dispose of the same upon the terms which eventually were reached and embodied in the contract of sale to Rheem.

2. The decision below, rendered by the Circuit Court of Appeals for the Third Circuit, is in sharp and direct conflict with decisions of other circuit courts of appeals:

(a) In the fifth circuit, in *Court Holding Company* v. *Commissioner of Internal Revenue* (decided July 11, 1944, ten days prior to the decision of the third circuit below), 143 F. 2d 823, reversing 2 T. C. 531. There the respondent specifically relied on The Tax Court decision in the instant case, referred to its unofficial report (1943-1944

P. H. Tax Court Memorandum Decisions Service ¶43-112) and called attention to the undetermined appeal therefrom. There The Tax Court had attributed to a corporate petitioner the sale of its sole asset consisting of an apartment house which had been consummated under a written contract of sale executed by its stockholders three days after they had received title thereto pursuant to a liquidating dividend distribation. Except for the name of the vendor the contract was in form and substance identical with one negotiated by and between the petitioner and the same purchaser, immediately before the liquidation resolution; the stockholders names were merely substituted for the corporation's name. At the time and place previously set for signing the corporate sales contract, the petitioner had refused to go ahead with the deal on account of the large income tax that would be involved and instead proceeded to liquidate and permit its stockholders to make the same deal. On appeal the Circuit Court for the Fifth Circuit reversed on the ground that the oral contract of sale did not bind the purchaser under Florida laws and that at the moment of conveyance to the stockholders, neither petitioner nor stockholders were bound by any corporate obligation to sell to the purchaser.

In the fifth circuit in *Commissioner* v. *Falcon*, 127 F. 2d 277, affirming 41 B.T.A. 1128. There the basic terms of a proposed sale by the petitioner corporation to an ultimate purchaser of certain leases owned by the corporation had all been agreed upon. The corporation later decided not to go ahead with the deal on account of the large tax consequence thereof to it. Instead it distributed the leases to its stockholders, who thereupon entered into the pre-negotiated deal. The contention of the Com-

missioner that the sale be deemed made by the stockholders as agents for the corporation and hence attributed to the corporation was overruled on the ground that there was no sales contract in existence when the distribution was made.

The test of separate recognition underlying the above two stated cases in the fifth circuit, but disregarded in the case at bar in the third circuit, was: At the time of the liquidating distribution were the shareholders free to choose whether or not to perform the proffered contract with respect to the distributed assets? If the corporation at the time of liquidation was under no legal liability to complete the bargain with respect to the distributed assets which ultimately eventuated, it was there held that the sale by the corporate distributee may not be attributed to the corporation.

(b) In the second circuit in *Chisholm* v. *Commissioner*, 79 F. 2d 14 (c. d. 296 U. S. 646), involving grant of an option by stockholders to purchase their stock, advice by optionees of an intention to exercise the option; ensuing formation of a partnership by optionors with a capital of the contributed shares for the avowed purpose of escaping taxes due on a prospective sale. The circuit court reversed the Board of Tax Appeals and gave separate recognition to the individual act of partnership formation notwithstanding the inevitable short time ownership of those assets and ensuing sale, on the ground that notice of intention to exercise the option was not the equivalent of an actual exercise thereof—the option was an offer to sell—not a contract for sale. Sellers became bound only when the price was tendered at which time the partnership owned the asset. The business purpose of the part-

nership was thus given separate recognition even though the partnership was bound to perform if optionee so elected. The courts below were clearly in error in distinguishing the *Chisholm* and *Falcon* cases (*supra*).

3. The decision sought to be reviewed ignores the tests for determining corporate intention underlying corporate distribution of property, which have been recognized and established by a long line of other Tax Court decisions. *Jemison*, 3 B.T.A. 70; *Conservative Gas Co.*, 30 B.T.A. 552; *Dudley* v. *Commissioner*, 15 B.T.A. 570; *Clara M. Tully Trust*, 1 T.C. 611; *Fruit Belt Telephone Co.*, 22 B.T.A. 440; *George T. Williams*, 3 T.C. 1002.

4. The writ should be allowed to correct the erroneous decision and judgment of the court below, and to permit adequate consideration and determination of questions common to the *Court Holding Company* case in the fifth circuit (*supra*) and the instant case in the third circuit: In the *Court Holding Company* case a petition for a writ of certiorari has been docketed by the Commissioner with this Honorable Court on October 11, 1944 entitled "No. 581. Commissioner of Internal Revenue, petitioner, *v.* Court Holding Company, respondent".

5. There is a marked tendency in the third circuit (illustrated by the decision below) and in some divisions of The Tax Court itself (as is illustrated by the four dissents in *Hobby* v. *Commissioner*, 2 T. C. 980) to ascribe to every conceivable sequence of events an integration, purpose or unity that was never remotely contemplated by the moving parties. The pendulum set in motion by the doctrine of the Dobson case (*Dobson* v. *Commissioner*, 320 U. S. 489) has been swung to such an extraordinary de-

gree, that every corporate dissolution, no matter how bona fide in conception, is met by the Commissioner with a cry of sham, subterfuge or meaningless interim ownership, if it chance that succeeding events show a further disposition of the assets acquired. In every day experience a great many corporate enterprises are in existence whose stockholders or directors have received, or are open to receive, offers for the purchase of their shares or assets. What legal inferences may be drawn, in the present confused state of the decisions, if they choose, with the utmost good faith, to proceed with orderly liquidation and distribution? Dare they commence negotiations either in an individual or corporate capacity before liquidating steps have been (1) initiated or (2) completely consummated, without subjecting the corporation to a tax liability which the Congress never contemplated by its statutory enactment? A clarification by this court of the rules of law applicable to the situation disclosed by the *Court Holding Company* and *Meurer* cases is necessary to reduce the present confusion and conflict. Although Section 115(c) of the 1936 Revenue Act is involved in the instant case, its liquidating plan provisions are still in force without change except for an extension of the period of liquidation from two to three years.

Prayer

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit commanding that court to certify and send to this court a full and complete transcript of the record and of the proceedings of said circuit court had in

this case numbered and entitled on its docket "No. 8520 Meurer Steel Barrel Co. Inc., petitioner *v.* Commissioner of Internal Revenue, respondent", to the end that this cause may be reviewed and determined by this court and that the decision and judgment of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court and that your petitioner have such other and further relief as may be just and proper.

Dated, New York, October 18, 1944.

MEURER STEEL BARREL CO. INC.,
Petitioner,
By EMANUEL A. STERN,
Counsel for Petitioner.